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Cold winters loom large? From Gazprom to the war of words on tariffs in the UK-the quest for efficient and open energy markets knows no end!

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The energy sector has represented a key target for the competition enforcement activities of the EU Commission for a considerable time. This activity has accompanied and in some cases followed the enactment of legislation designed to liberalise the markets for the supply of gas and electricity, through the imposition of unbundling and infrastructure sharing obligations on incumbents (often former state monopolists). While sector specific regulation has undoubtedly been effective in removing barriers to entry and in creating the conditions for a more contestable market in many member states, it has not been wholly successful in curtailing the ability of incumbents to seek to shape the conditions of competition on the retail markets in a way that could be detrimental to newcomers, for instance by downgrading the conditions of access to the infrastructure or by seeking to tie customers via long-term arrangements, not just on the retail market, but also at wholesale level. Competition decisions adopted since 2006 and addressed to major European former monopolists such as Distrigas in Belgium, RWE and E.ON in Germany and EdF in France show that ex post competition enforcement is an indispensable complement to sector regulation since it prevents the old monopolists, which invariably, at least for a time, are dominant on their respective relevant markets, from countervail, via their commercial practices, many of the positive effects of the liberalisation measures.

Yet, it appears that the road toward realising efficient, competitive markets in which energy is affordable as well as secure is rather uphill. The recent statement of objections issued by the Commission against the Russian energy company Gazprom (see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/937>), alleging a number of infringements of Article 102 TFEU, especially to the detriment of customers in Central and Eastern European Member States, represents a good example of how "national champions", whether established within the Union or, as is the case with Gazprom, in non-Member States, can act in such a way as to foreclose the energy markets vis-a-vis rivals and thereby engender situations of dependency as regards supply in sizeable areas of the single market.

A very extensive and exhaustive run through the Gazprom investigation and related matters is provided by a recent paper authored by Alan Riley, Professor of Law at City University and Fellow of CEPS at: <http://www.ceps.eu/book/commission-v-gazprom-antitrust-clash-decade>. As is well known, Gazprom stands accused of partitioning markets, of applying "unfair prices" and of "preventing the diversification of the consumption of gas", to the detriment of EU consumers, via a number of prima facie illegitimate practices, such as restricted access to the infrastructure (namely, the well known pipelines carrying gas from Central Russia and the Caucasus to more Western parts of Europe); downgraded levels of service in transporting gas to Central and Eastern Europe; the practice of concluding long-term contracts of supply with a number of companies established in several member states in this and other areas.

These allegations present a number of difficulties, especially in terms of evidence, for the Commission: taking the allegation of "unfair pricing", this is admittedly fraught with problems. For instance, how should an "equally efficient" rival be identified? And how high (or low) should a price be to be "unfair"? As to the other allegation of market partitioning this may admittedly be slightly easier to support with evidence: a careful analysis of pricing trends across the Member States concerned, for instance, could give the Commission clues as to whether a similar accusation is well founded. But, assuming that the Commission is successful in gathering evidence and making a

convincing case as to the existence of an infringement, could a prohibition decision, backed by fines, be the most appropriate way of terminating the infringements? As may be easily recalled, Gazprom, given its economic strength and, let's face it, its political adherences with the Putin regime, is admittedly notorious for the threats to interrupt or restrict supply of gas. This has already occurred a few years ago against a number of its key customers (see e.g. <http://www.bbc.co.uk/news/10362731>). Accordingly, it could legitimately be questioned whether taking such a "heavy handed" strategy may be helpful, especially since (as the example of Lithuania shows-the country is 100% supplied by Gazprom) it would still be essential to maintain ties with the company in question, at least until such time as alternative sources of energy, especially renewable, are found and developed and thereby brought in a position of being capable of withstanding demand.

As the experience emerging from the energy market study showed, commitments decisions, designed to put an end to the anti-competitive practices under a degree of supervision, may represent an equally efficient response to the consequences of unlawful behaviour. However, this response presents inevitable risks, the first being the fact that it would not be based on a conclusive finding of infringement and the second, and perhaps the most significant, from a practical standpoint, being the fact that the efficacy of commitments decision relies heavily on the ability of the competition authorities to monitor compliance with them. Perhaps it could be wondered whether the Commission would be better advised in "chancing" its way through a full-blown investigation procedure, culminating with a "real" response to Gazprom's suspected unlawful practices. It is suggested that taking this course of action would allow the Commission to exercise not just its detection powers, thus being able to reach a definitive decision that an infringement has actually taken place. It would also enjoy the power to impose remedies on the investigated company, which would allow it to address the concerns identified already at this preliminary stage, along with imposing financial penalties. As Microsoft has demonstrated, Article 7 can be deployed both flexibly and effectively to terminate the infringement as well as to allow rivals, who would otherwise be foreclosed from the market as a result of the dominant undertaking's misdemeanours, to be put on a more even footing in attempting to enter that market. Accordingly, it would definitely represent a more effective response to the consequences of Gazprom's behaviour in particular as well as being consistent, more generally, with the concerns for improving on openness and rivalry of the energy markets, goals in the realisation of which the Commission has invested significant resources as well as political capital.

But alas, the woes for policy makers arising from the energy industry are not limited to the action of the European Commission. It appears that the UK Government, ostensibly out of a concern for growing gas and electricity prices, is preparing to legislate in order to "force" energy suppliers to apply their "lowest" tariffs to their customers' bills. At PM questions on 17 October the Prime Minister said: "I can announce... that we will be legislating so that energy companies have to give the lowest tariff to their customers, something that Labour didn't do in 13 years, even though the leader of the Labour Party could have done because he had the job." (see: <http://www.bbc.co.uk/news/uk-19986929>)

However laudable the objectives of the PM may be (especially given the ongoing difficulties that many families face in paying their utility bills and the rising numbers of households in "fuel poverty"), this announcement rings many alarm bells in the ears of any competition lawyer. What is meant by "lowest tariffs"? According to which benchmarks can this assessment be made? And secondly, how can it be ensured that, purportedly in order to fulfil their obligation under the proposed Energy Bill, suppliers will not conspire in their determination of what is the "lowest tariff"?

In respect to the first question, it is surely indispensable that suppliers should be "transparent" as to how their tariffs are calculated so that customers can compare each offer and thereby make an informed choice as to which firm to choose. However, how in actual fact each tariff is determined remains very much within the gift of each supplier and is therefore determined on the basis of confidential information. Against this background, it is clear that what appear to be "lowest tariffs" may not actually coincide with "competitive" tariffs, that is with the lowest

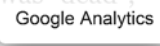
prices that can be set having regard to the actual conditions of competition, of the size and number of rivals and of any other relevant factor characterising the industry at a given time. It could be added that such a scenario brings back to memory one of the most famous problems in competition law, namely the so-called "cellophane fallacy", which, it was alleged, had marred the US Supreme Court decision in the DuPont case. Be as it may, it is surely questioned whether imposing such a generalised obligation on suppliers, in the context of a market that is already subjected to significant regulation, is really likely to benefit consumers, as well as being objectively feasible. To the contrary, and coming to the second question highlighted above, the concern may well be raised that imposing such a blanket obligation would restrict competition between suppliers considerably, as well as pushing smaller ones into a potentially unsustainable position of having to "meet competition" on the part of the major energy companies by, in substance, ending up pricing almost at a loss.

In a very recent blog post (see: <http://competitionpolicy.wordpress.com/2012/10/19/the-likely-effects-of-compelling-energy-firms-to-give-customers-the-lowest-tariff/#more-790>), Catherine Waddams, of the Centre for Competition Policy at UEA, said: "Since any offer which a company made to try and encourage switching would oblige them to lower all the charges they make to their established customers, we would not expect to see very many offers.(...) A small new competitor, with perhaps 100,000 consumers (less than half a percent of the market), would face a cost of £2million from lost revenue with existing accounts if it offered a twenty pound discount to attract new customers." Consequently, it could be argued that the obligation to bring all customers on the "lowest" tariffs would not only repress competition on the retail market, by producing a "bird-mirror effect" and thereby encouraging all energy suppliers on to a nigh to uniform price to their end users. It would also be detrimental to the commitment to encouraging new entrants in the industry: it may legitimately be expected that any benefits arising from attracting new customers would be more than compensated with losses in revenue which may be very difficult to offset, especially given the high fixed and wholesale supply costs associated with energy production.

In light of the above, it may be argued that the PM's announcement is at odds with the Government's commitment to both a more diversified energy supply side and a wider pool of energy sellers more generally. If this position, with all the difficulties it is fraught with, is compounded with the Chancellor's retrenchment from the Exchequer's financial support toward "green" energy, it is easy to see how some commentators may have been justified in branding this latest Prime Ministerial announcement as "confused" (see for example, in the Guardian, <http://www.guardian.co.uk/environment/2012/oct/18/coalition-energy-policy-lowest-tariff?intcmp=239>).

Thankfully for Mr Cameron, his Energy Minister was ready to "take it on the chin" and issue a rather more anodyne statement on these issues (see <http://www.guardian.co.uk/business/video/2012/oct/18/energy-secretary-lowest-tariff-video?intcmp=239>). Ed Davey emphasised the pivotal role of competition among suppliers and easier switching, the latter backed up by fuller information as to the competing offers available to consumers and by safeguards against "abusive commercial practices" (such as those emerged from door-to-door selling in the past), as the lynchpin of the energy market for the UK in the future. However, he was silent as to the obligation to bring all consumers on the lowest tariffs-something that could potentially be interpreted as a sign that the PM's declaration had not formed the subject matter of deep cabinet discussion. To all this the OFGEM response, issued at 7am on 19 October, adds further colour (for a good sum up, one can refer to, inter alia, <http://www.guardian.co.uk/money/2012/oct/19/energy-firms-customers-cheapest-tariff>). In a key that was not very different from that characterising the Minister's views, the sector regulator emphasised the need to have a clearer, much more linear and easier to compare set of tariffs. The Office seeks to put an end to an excessively wide variety of prices and to move toward simpler bills and up to 4 only tariff tiers. OFGEM also plans to oblige suppliers to inform customers as to the available tariffs and to bring to their attention any more advantageous deal. However, as is clear from its announcement (see http://www.ofgem.gov.uk/markets/retmkt/rmr/consumers/pages/index.aspx?utm_source=homepage&utm_medium=banner&utm_campaign=simpler_clearer_fairer), it stops short of obliging suppliers, tout court, to "move" customers on

to the lowest available rate-unless in the rather exceptional case of a "vulnerable" client whose tariff was "dead" i.e. no longer on offer.



So, too much ado about nothing? It could be argued that Ofgem's announcement, together with the urgent answer given by the junior Minister for Energy, John Hayes, to the Commons yesterday, confirm the existing commitment to securing more effective competition on the energy market, via provision for simpler tariffs and easier switching for individual users (see <http://www.guardian.co.uk/politics/2012/oct/18/energy-minister-cameron-hot-air?INTCMP=SRCH>). however, arguably this debate raises deeper questions for the existing Government's energy policy: it would appear that energy is fast becoming another thug of war for the Cabinet, i.e. another instrument for "grabbing headlines" and try to win over "easily" consensus via well-sounding but not very thought through announcements, which require quick backtracks from other Ministers and, as is the case in respect to energy prices, the energy regulator. It is suggested that this view seems confirmed by the fact that earlier today Mr Cameron, speaking from Brussels, far from either glossing over or indeed correcting his views on this issue, chose to renew his commitment to the "switch to lowest tariff" solution, but only as part of the debate concerning the new Energy Bill (see: <http://www.guardian.co.uk/money/2012/oct/18/david-cameron-energy-bill-tariff-plan>). Admittedly, this does not promise very much for a debate that would require much clearer direction and, more to the point, far stronger grounding in competition principles and evidence based policy- and law-making.

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